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Avoiding Deliberation: Why the "Safe Space" Campus Cannot Comport with Deliberative Democracy

Nicholas A. Schroeder

AVOIDING DELIBERATION: WHY THE "SAFE SPACE" CAMPUS CANNOT COMPORT WITH DELIBERATIVE DEMOCRACY

I. INTRODUCTION

> In everyday life the exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from the standpoint of others and the limits of our vision are brought home to us . . . The benefits from discussion lie in the fact that even representative legislators are limited in knowledge and ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments.
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> —John Rawls, *A Theory of Justice*

In November of 2015 Jonathan Butler, a student at the University of Missouri, started a hunger strike in response to the university president's lack of concern for various racist incidents on campus.[1] Eventually, the Mizzou football team joined Butler in his strike when the team refused to practice or play another game until the president of the university resigned.[2] The protest sparked a much larger protest on campus and resulted in thousands of protestors on the university quad.[3] The protests were sparked by the occurrence of racist vandalism and epithets used to disparage black student groups and individual black students.[4] The university

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[1] Jason M. Vaughn, *Mizzou Protestors: Stay Out of Our 'Safe Space' or We'll Call the Cops*, DAILY BEAST (Nov. 9, 2015, 2:20 PM), http://www.thedailybeast.com/articles/2015/11/09/mizzou-protesters-to-media-stay-out-of-our-safe-space-or-we-ll-call-the-cops.html.

[2] *Id.*

[3] *Id.*

[4] Alix Wiggins, *Students Plead Guilty to Littering in Cotton Ball Incident at Black Culture Center*, THE MISSOURIAN (May 5, 2010), http://www.columbiamissourian.com/news/students-plead-guilty-to-littering-in-cotton-ball-incident-at/article_b248de86-b237-561a-8ed0-7dfcf9b9d972.html; Michael E. Miller, *Black Grad Student on Hunger Strike in Mo. After Swastika Drawn with Human Feces*, WASHINGTON POST (Nov. 6, 2015),

was plagued by incidents in which students dumped cotton balls on the steps of a black culture center, a drunk student yelled racial slurs during a black student group's homecoming parade practice, and a swastika made of feces was found on campus.[5] When the president of the university resigned, an impromptu protest coalesced on the university quad.[6]

The large protest on the quad received widespread media attention from national news sources.[7] However, the protest created a hotbed for disagreement and resentment between students and media sources when protestors attempted to banish the media from covering the event.[8] The protest area was deemed a "safe space" for black students to go to escape racism on campus and the "insensitivity they encounter in the news media."[9] To keep the media from covering the event, protestors linked arms and began to push media out of the safe space.[10] One photographer was forcibly removed by protestors. This incident caused reporters to complain that anyone not sympathetic to the movement was not welcome in the area.[11]

Hostilities toward opposing minority viewpoints on college campuses are nothing new to this country and have been fostered by the complicity of college administrations.[12] Increased focus on civil rights and minority student retention "has understandably given rise to new attempts by some institutions to regulate the use of hostile, intimidating, and harassing speech on campus."[13] However, the number of universities that focus on regulating speech has given rise to a

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https://www.washingtonpost.com/news/morning-mix/wp/2015/11/06/black-grad-student-on-hunger-strike-in-mo-after-swastika-drawn-with-human-feces/; Thomas Dowling, *One Month Later, What's Next for the University of Missouri Protestors?*, USA TODAY (Nov. 27, 2015, 10:24 AM), http://college.usatoday.com/2015/11/27/whats-next-university-of-missouri/.

[5] *Id.*

[6] Vaughn, *supra* note 1.

[7] *See supra* notes 1–4.

[8] Vaughn, *supra* note 1.

[9] Terrell Jermaine Starr, *There's a Good Reason Protesters at the University of Missouri Didn't Want the Media Around*, WASHINGTON POST (Nov. 11, 2015), https://www.washingtonpost.com/posteverything/wp/2015/11/11/theres-a-good-reason-protesters-at-the-university-of-missouri-didnt-want-the-media-around/.

[10] Vaughn, *supra* note 1.

[11] Starr, *supra* note 9.

[12] Richard Kirk Page & Kay Hartwell Hunnicutt, *Freedom for the Thought That We Hate: A Policy Analysis of Student Speech Regulation at America's Twenty Largest Public Universities*, 21 J.C. & U.L. 1, 2 (1994).

[13] *Id.*

tension between minority students' rights to equal education environments and the rights of other citizens to exercise their right to free speech in disagreement with various social movements.[14] In an attempt to combat what many universities have deemed to be hateful speech, universities across the country have enacted speech codes for their students.[15] College speech codes were enacted to prevent "racist, sexist, and, in some instances, any speech that may create a 'hostile learning environment.'"[16] Furthermore, the combination of speech codes with the social movement of political correctness may have a damaging chilling effect on free expression on college campuses.[17] Proponents of political correctness on college campuses believe that because "the mere discussion of certain ideas or viewpoints offend certain groups, the expression of these ideas or viewpoints should not be allowed."[18] As a result, free expression on college campuses is under attack.[19]

The combination of campus speech codes and political correctness has produced college environments that are intolerant of opposing viewpoints.[20] The recent protests advocating for safe spaces, like those on the campus of the University of Missouri, have put viewpoint intolerance in the media spotlight.[21] Part II of this Note examines the state of free expression on college campuses.[22] Part III discusses the role of free expression and deliberation in a democracy.[23] Part IV argues that the establishment of safe spaces is an attempt to

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[14] *Id.* at 3.

[15] Melanie A. Moore, *Free Speech on College Campuses: Protecting the First Amendment in the Marketplace of Ideas*, 96 W. VA. L. REV. 511, 513 (1994).

[16] *Id.*

[17] *Id.* at 517–18.

[18] Craig B. Anderson, Comment, *Political Correctness on College Campuses: Freedom of Speech v. Doing the Politically Correct Thing*, 46 S.M.U. L. REV. 171, 174 (1993).

[19] *See infra* Part II.

[20] *See infra* Part IV.

[21] *See* Judith Shulevitz, *In College and Hiding From Scary Ideas*, NEW YORK TIMES (Mar. 22, 2015), http://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html?_r=0; Conor Friedersdorf, *Campus Activists Weaponize 'Safe Space'*, THE ATLANTIC (Nov. 10, 2015), http://www.theatlantic.com/politics/archive/2015/11/how-campus-activists-are-weaponizing-the-safe-space/415080/; Charles M. Blow, *Race, College and Safe Space*, NEW YORK TIMES (Nov. 16, 2015), http://www.nytimes.com/2015/11/16/opinion/race-college-and-safe-space.html.

[22] *See infra* Part II.

[23] *See infra* Part III.

avoid deliberation on topics and ideas that college students do not like.[24] Lastly, Part IV also argues that safe spaces that chill the speech of those with opposing viewpoints cannot satisfy the requirements of a deliberative democracy and therefore hurt the democratic process.[25] In order to solve the problem of public college campuses chilling speech of unpopular opinions, those colleges should embrace the theory of deliberative democracy in crafting their policies for dealing with unpopular protests or speakers.

II. THE RISE OF THE SAFE SPACE CAMPUS AND THE STATE OF FREE EXPRESSION ON CAMPUS

The safe space campus is a theoretical campus in which students are zealously opposed to ideas that are not widely accepted in their college social circles. Recently on college campuses, college administrations have focused on regulating speech that most of society has deemed "hostile, intimidating, or harassing."[26] Many schools, rightfully so, have sought to eliminate hate speech from their campuses.[27] However, overzealous regulation of speech has led to a tension between "the rights of minorities to fair and equal educations, environment, and opportunity" and "the rights of citizens of the United States to exercise freedom of speech, even when that speech is demeaning to others."[28] Furthermore, the combination of administration-imposed speech codes and the rise of the political correctness philosophy has resulted in a learning environment in which the discussion of ideas that are critical to the majority view are frowned upon.[29]

A. The State of the Law on Public College Campuses

The current state of public forum law is that the government must allow the citizens of the United States, the rightful owners of the streets and other public lands, use of that land for free expression.[30] The government may regulate

[24] *See infra* Part IV.

[25] *See infra* Part IV.

[26] Page & Hunnicutt, *supra* note 12, at 2.

[27] *Id.* at 6.

[28] *Id.* at 3.

[29] Anderson, *supra* note 18, at 176–77.

[30] Page & Hunnicutt, *supra* note 12, at 10 ("Current public forum theory now

behavior that would be disruptive to the intended use of the property; for example, a public baseball park may not be used for a protest, but the sidewalks and parking lot of the park may be used.[31] However, the government may never regulate speech based on the content of the speech.[32] Any content-based regulations imposed by the government are presumed to be invalid.[33] So long as the regulation is not content based, the government may regulate public forum speech on public college campuses "with respect to the time, the place, and the manner in which student groups conduct their speech-related activities."[34]

The Supreme Court defined what kind of content-neutral government regulation of speech in a public forum was reasonable in *United States v. O'Brien*:[35]

> (a) they are within the constitutional power of the government; (b) they further an important or substantial governmental interest; (c) the governmental interest is unrelated to the suppression of the free expression; and (d) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[36]

Then, in 1981, the Court decided *Heffron v. International Society for Krishna Consciousness* in which it supplemented the *O'Brien* test with two additional requirements that any regulations of speech must: (e) be justified without reference to the content of the regulated speech; and (f) leave open ample

concludes that governments must allow access to streets, parks, and other public property for use by its owners, the citizen of the United States.").

[31] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799–800 (1985) ("Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.").

[32] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.") (citations omitted).

[33] *Id.*

[34] Healy v. James, 408 U.S. 169, 192–93 (1972) ("Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected.").

[35] 391 U.S. 367 (1968).

[36] Page & Hunnicutt, *supra* note 12, at 11; *see O'Brien*, 391 U.S. at 377.

alternative channels for communication of the information.[37] Thus, the government must overcome the six hurdles set forth in *O'Brien* and *Heffron* in order to regulate speech in a public forum, such as a public college campus.[38]

In *Cornelius v. NAACP Legal Defense and Education Fund*, the Supreme Court identified the types of areas in a public university where speech may occur and where the government may attempt to regulate speech.[39] Traditional public fora on college campuses have been identified as "streets, sidewalks, open mall areas, and other generally public areas on campus."[40] In *Cornelius*, the Court concluded that "[b]ecause the principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[41] The Court further stated that where a public university has designated an area as a public forum for speakers and protests, a speaker or protestor cannot be excluded from that area without a compelling governmental interest.[42] However, the Court has distinguished traditional public fora and designated public fora from non-traditional public fora on a college campus.[43] A speaker or protestor on a college campus may be excluded from a non-traditional public forum "as long as the restrictions are 'reasonable and [are] not an effort to suppress the expression merely because public officials oppose the speaker's view.'"[44] In *Cornelius*, the Court defined a non-traditional public forum as "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of

[37] Page & Hunnicutt, *supra* note 12, at 11; *see also* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647–48 (1981) ("We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.").

[38] *See O'Brien*, 391 U.S. at 377; *Heffron*, 452 U.S. at 647–48.

[39] 473 U.S. 788, 800 (1985).

[40] Page & Hunnicutt, *supra* note 12, at 11.

[41] *Cornelius*, 473 U.S. at 800.

[42] *Id.* ("Similarly, when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.").

[43] *Id.*

[44] *Id.* (citation omitted).

certain subjects."[45] *Cornelius* solidified the Court's support for the idea that university campuses are the physical embodiment of the "marketplace of ideas."[46]

B. The Rise of Speech Codes on Campus

College speech codes were enacted across the country in an attempt to root out racist, sexist, and homophobic speech that was perceived by many to be on the rise on college campuses.[47] Speech code proponents argue that instituting a speech code is necessary to protect students from prejudice on campus.[48] Proponents have pointed to the rise of "Reaganism" and conservative values as the reason for the rise in "increased racial tensions and hate speech at college campuses."[49] Opponents of speech codes argue that universities have overreacted to the presence of hate speech on campuses by enacting speech codes "without verifying the accuracy of the complaints filed against students and without determining whether such incidents actually occur on their campus more than other schools."[50]

Speech codes have supplemented Supreme Court precedent barring the use of hate speech toward another individual in public.[51] In *Chaplinsky*, the Court recognized that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[52] The Court recognized that "fighting words" are words "which by their very utterance

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[45] *Id.* at 802.

[46] Page & Hunnicutt, *supra* note 12, at 12 ("In addition to being viewed by the courts as a public forum, the streets, sidewalks, and open malls of a university are also seen as having special characteristics and missions inherent to an institution of higher education. These special characteristics become readily apparent when looking at the university, as judges have done, as a 'marketplace of ideas.'"); *see also* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, . . . otherwise our civilization will stagnate and die.").

[47] Moore, *supra* note 15, at 514 ("The primary argument for the enactment of college speech codes is that universities are witnessing a terrible rise in incidents of racist, sexist, and homophobic speech.").

[48] *Id.* at 514–15.

[49] *Id.* at 515.

[50] *Id.* at 517.

[51] *See generally* Chaplinsky v. New Hampshire 315 U.S. 568 (1942).

[52] *Id.* at 571–72.

inflict injury or tend to incite an immediate breach of peace."[53] As a result, the *Chaplinsky* Court designated "fighting words" as speech that was outside the scope of First Amendment protection.[54] The Court created a test to determine what "fighting words" are when it said that the "test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."[55] Then, in *Beauharnais v. Illinois*, the Court expanded the fighting words doctrine to include libelous statements made to groups in addition to individuals.[56] College speech codes have been enacted in order to punish "racist, sexist, and, in some instances, any speech that may create a 'hostile learning environment,'" which are all common themes that parallel the early foundational cases dealing with fighting words and hate speech.

Despite the close parallels between the Supreme Court's early foundational cases on unprotected speech and the college speech codes enacted in the 1980's, speech codes found little acceptance among the judiciary.[57] For example, in *Doe v. University of Michigan*,[58] the District Court struck down a speech code that prohibited "[a]ny behavior . . . that stigmatizes or victimizes any individual on the basis of race, ethnicity, religion, [or] sex. . . ."[59] The District Court concluded that the language describing behavior that "stigmatizes or victimizes" was so vague that a student could not conform his conduct to the rule and definitively know whether he was violating the speech code.[60] The Court invalidated the speech code on due process grounds.[61] Similarly, a Wisconsin District Court struck down a similar speech code for being overbroad and for failing to meet *Chaplinsky's* fighting words test and balancing test.[62] Therefore, some courts have been unwilling to

[53] *Id.* at 572.

[54] *Id.* at 574.

[55] *Id.* at 573.

[56] 343 U.S. 250, 258 (1952) ("But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this a willful and purposeless restriction unrelated to the peace and well-being of the State.").

[57] Page & Hunnicutt, *supra* note 12, at 17–23.

[58] 721 F. Supp. 852 (E.D. Mich. 1989).

[59] *Id.* at 856.

[60] *Id.* at 867.

[61] *Id.*

[62] UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991).

uphold speech codes that are not narrowly tailored to unprotected speech.[63]

Speech codes have generally failed to pass constitutional muster as a result of the codes being overbroad.[64] Courts have held speech codes to be overbroad when they are "designed to burden or punish activities which are not constitutionally protected, but . . . includes within its scope activities which are protected by the first amendment."[65] Codes that attempt to punish unprotected speech, but, when applied, include protected speech, have violated the First Amendment and are defined as being overbroad.[66] In *Broadrick v. Oklahoma*, the Supreme Court defined the overbreadth doctrine in the context of the First Amendment.[67] In *Broadrick*, the Court noted that "the First Amendment needs breathing space and the statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society."[68] Therefore, a statute infringing the First Amendment must be narrowly tailored and must be tied to a government interest far more important than the individual's interest in free expression.[69]

C. The Philosophy of Political Correctness on Campus

The philosophy of political correctness ("PC") has likewise become popular on college campuses.[70] The combination of speech codes and self-imposed political correctness by the student body may lead to "many students . . . being punished as much for what they think as for what they say."[71] Political correctness and speech codes operate very similarly since the "political correctness philosophy posits that because the mere

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[63] Moore, *supra* note 15, at 525.

[64] *Id.*

[65] *Id.* (quoting JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.8 (3d ed. 1986)).

[66] *Id.* ("In other words, a court will consider a speech code overbroad if it purports to punish only unprotected speech, such as fighting words, but also punishes speech protected by the First Amendment.").

[67] 413 U.S. 601, 611–12 (1973).

[68] *Id.*

[69] *Id.*; *see also supra* notes 57–63 and accompanying text.

[70] Moore, *supra* note 15, at 517.

[71] *Id.*

discussion of certain ideas or viewpoints offend certain groups, the expression of these ideas or viewpoints should not be allowed."[72] Merriam-Webster defines "Politically Correct" as "conforming to a belief that language and practices which could offend political sensibilities (as in matters of sex or race) should be eliminated."[73] Thus, the political correctness movement and the enactment of speech codes on college campuses both have similar goals: to remove racist and sexist speech from public use.[74]

PC culture, like college speech codes, has undertaken a noble cause and has succeeded.[75] PC culture on college campuses gained a foothold as a result of a rise in hate crimes and sexual harassment.[76] During the mid-nineties, a million students reported being harassed on campus.[77] Like speech codes, PC culture assumes that certain words and actions are inherently biased and society would be better off not using those words. As a result, PC culture has declared various words in the English language as being harmful and, thus, using those words to make an argument would be akin to taking an immoral position.

D. The Heckler's Veto Cases

In First Amendment jurisprudence, one of the least developed and overlooked lines of cases are the heckler's veto cases, which grew out of the "clear and present danger" cases.[78] These cases deal with the problem that may arise when an unpopular public speaker's speech causes a crowd to grow violent which may result in the government silencing the speaker instead of the violent crowd.[79] The heckler's veto cases are interesting because they hint that while the government

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[72] Anderson, *supra* note 18, at 174 (citing John Leo, *PC Follies: The Year in Review*, U.S. NEWS & WORLD REPORT (Jan. 27, 1992)).

[73] *Politically Correct*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/political%20correctness (Mar. 26, 2016).

[74] *See supra* Subpart II.B. (discussing the enactment of speech codes in order to shield college students from speech deemed to be sexist or racist).

[75] *Id.* at 696 (noting the rise of hate crimes and sexual harassment on college campuses).

[76] *Id.*

[77] *Id.*

[78] Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1308 (2006).

[79] *Id.*

may not be able to burden the free speech rights of individuals or groups based on content, the government may have an affirmative role in ensuring that unpopular viewpoints are not censored by people or groups with opposing viewpoints.[80] Heckler's veto cases arose in the context of a public speaker speaking to a crowd that grew violent in reaction to the speech.[81] As a result of the public speaker's unpopular views, the local police force will step in and ask the speaker to stop speaking in order to avoid the crowd growing violent.[82] Thus, the government would be infringing the speaker's First Amendment right to speak in public as a result of opponents in the crowd growing violent, thus, resulting in a heckler's veto of the speech.[83] The practical implications of the heckler's veto are that any group of people opposed to the viewpoints of the speaker may cause enough of a ruckus to convince the police that public safety (or safety of the speaker) is at risk and cause the police to shut the speech down.

In 1949, in a precursor case to the heckler's veto line of cases, the Court in *Terminiello v. City of Chicago* reversed the conviction of Arthur Terminiello after he was arrested and convicted of "breach of the peace" as a result of his address to the Christian Veterans of America in a Chicago auditorium.[84] Due to Terminiello's speech, a large protest coalesced outside of the auditorium.[85] The protestors grew violent and the police responded to "several disturbances" due to an "angry and turbulent crowd."[86] The Court reversed Terminiello's conviction on the grounds that he was convicted because "his speech stirred people to anger, invited public dispute, or brought about a condition of unrest," which are reasons that go against the purpose of the First Amendment.[87] The Court recognized that "free debate and free exchange of ideas" are essential to an

[80] *Id.* ("The relevance of heckler's veto case law lies in its strong commitment to fulfilling the First Amendment's ultimate goal of allowing viewpoints to be expressed, even when violence is in the offing.").

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Terminiello v. City of Chicago, 337 U.S. 1, 2–3, 6 (1949).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 5 ("The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.").

enlightened society and distinguish the United States from "totalitarian regimes" throughout the world.[88] Thus, in *Terminiello*, the Court began to acknowledge the problem that may arise when a crowd of hecklers seeks to silence an unpopular viewpoint.[89]

In *Feiner v. New York*, Justices Black and Douglas expressed concern that minority viewpoints would continue to be silenced by a heckler's veto.[90] Irving Feiner was speaking from a wooden box and was critical of "President Truman, the American Legion, the Mayor of Syracuse, and other local political officials."[91] When Feiner "gave the impression that he was endeavoring to arouse the Negro people against the whites," some listeners in the crowd became visibly upset.[92] As a result, the police asked Feiner to break up the crowd and stop speaking.[93] However, Feiner refused to leave and kept speaking, which resulted in his arrest for disorderly conduct.[94]

The majority recognized that "a hostile audience cannot be allowed to silence a speaker," but sided with the State of New York's argument that the police were merely keeping the peace.[95] The Court balanced Feiner's right to speak against the State's right to ensure order and decided that it "should not reverse this conviction in the name of free speech."[96] However, Justices Black and Douglas were concerned about the Court's conclusion that the police may be used to suppress speech because people with opposing viewpoints may grow violent.[97] Specifically, the Justices were concerned that this type of police action may become a police custom in dealing with unpopular

[88] *Id.* at 4 (arguing that "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes").

[89] *See generally Terminiello*, 337 U.S. 1.

[90] *See* Feiner v. New York, 340 U.S. 315 (1951) (Black, J., dissenting); *id.* (Douglas, J., dissenting).

[91] *Id.* at 317.

[92] *Id.*

[93] *Id*

[94] *Id* at 318.

[95] *Id* at 320–21.

[96] *Id.* at 321 ("It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.").

[97] *Id* at 326–27 (Black, J., dissenting); *id.* at 331 (Douglas, J., dissenting).

speakers.[98] Justice Black remarked that the Court's holding meant that "minority speakers can be silenced in any city."[99] Furthermore, Justice Black ominously predicted that while an unpopular speaker cannot be restrained from speaking, the speaker can be silenced "as soon as the customary hostility to his views develops."[100] Justice Black ended his dissent with an appeal to deliberative democracy in which he noted that a speaker seeking to convince others may exaggerate when exercising his right to free speech, but, "in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[101] Thus, Justice Black introduced the idea of the heckler's veto in First Amendment jurisprudence.

In *Forsyth County v. Nationalist Movement*, the Court again addressed the heckler's veto and its effect on unpopular speech.[102] In *Forsyth County*, the county passed an ordinance that required groups wishing to hold a parade to pay the heightened cost to have a police presence at the parade.[103] The ordinance was passed in response to a civil rights march that was met with opposition from the Ku Klux Klan ("KKK").[104] When KKK counterdemonstrators began to throw rocks and bottles, the police were forced to end the civil rights march.[105] The next weekend, organizers planned an even larger civil rights march, which consisted of twenty thousand marchers, one thousand counterdemonstrators, and three thousand local police and national guardsmen to keep the peace.[106] The police presence at the larger march cost $670,000, of which Forsyth County was responsible for a small portion.[107] As a result of the large cost, the County of Forsyth passed the ordinance requiring parades and demonstrations to pay to have police

[98] *Id.* at 326–27 (Black, J., dissenting); *id.* at 331 (Douglas, J., dissenting).

[99] *Id.* at 328 (Black, J., dissenting).

[100] *Id.* at 329.

[101] *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (Roberts, J.))

[102] *See generally* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992).

[103] *Id.* at 126 ("The ordinance required the permit applicant to defray these costs by paying a fee, the amount of which was to be fixed 'from time to time' by the Board.").

[104] *Id.* at 125.

[105] *Id.*

[106] *Id.* at 125–26.

[107] *Id.* at 126.

presence.[108] Furthermore, the county could adjust the fee based on the amount of police presence required at the event.[109] The Court held that the ordinance was content-based because the costs imposed on the marchers were "associated with the public's reaction to the speech" and "[l]isteners' reaction to speech is not a content-neutral basis for regulation."[110] The Court added that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[111]

Recently, the Sixth Circuit, in *Bible Believers v. Wayne County, Michigan*, affirmed the government's affirmative duty not to effectuate a heckler's veto.[112] The Bible Believers are a Christian evangelical group that protested at the 2012 Arab International Festival by holding up signs and hurling words that were offensive to Muslims.[113] A crowd within the festival began to heckle the Bible Believers and, eventually, began to throw bottles and garbage at the evangelical protestors.[114] The Wayne County Sheriff's Office did not intervene to stop the hecklers, but instead asked the Bible Believers to stop using a megaphone during their demonstration.[115] The Bible Believers were given the choice to be arrested for their use of a megaphone or leave the festival.[116] The Bible Believers were escorted from the festival under threat of arrest.[117]

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[108] *Id.*

[109] *Id.* at 133–34 ("As construed by the county, the ordinance often requires that the fee be based on the content of the speech.").

[110] *Id.* at 134.

[111] *Id.* at 134–35.

[112] Bible Believers v. Wayne Cty., 805 F.3d 228, 255 (6th Cir. 2015) ("On this record, there can be no reasonable dispute that the WCSO effectuated a heckler's veto, thereby violating the Bible Believers' First Amendment rights.").

[113] *Id* at 238 ("As they had done the previous year, the Bible Believers traveled to the Festival so that they could exercise their sincerely held religious beliefs. Unfortunately for the Festival-goers, those beliefs compelled Israel and his followers to hurl words and display messages offensive to a predominantly Muslim crowd, many of whom were adolescents.").

[114] *Id.* at 239.

[115] *Id.*

[116] *Id.*

[117] *Id.* ("Despite this apparent lack of effort to maintain any semblance of order at the Festival, each time the police appeared on the video—to reprimand the use of the Bible Believers' megaphone, to suggest that the Bible Believers had the 'option to leave' the Festival, to trot by on horseback while doing next to nothing, and to expel the Bible Believers from the Festival under threat of arrest—the agitated crowd became subdued and orderly simply due to the authoritative presence cast by the police officers who were then in close proximity.").

The Sixth Circuit held that Wayne County violated the First Amendment rights of the Bible Believers when the county cut off the Bible Believers' speech on the basis of the views that they were expressing.[118] The court found that the Bible Believers' speech was constitutionally protected, and "[w]hen a peaceful speaker . . . is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals."[119] The court based its heckler's veto analysis on the First Amendment's importance to democracy.[120] The court recognized that the freedom to espouse political and religious beliefs "is too important to our democratic institution for it to be abridged simply due to the hostility of reactionary listeners who may be offended by a speaker's message."[121] As a result, the court recognized that the Wayne County Sheriff's Office had an affirmative duty to protect the Bible Believers from hecklers and to not effectuate the heckler's veto.[122]

The current state of the law on public college campuses requires that the government satisfy some form of heightened scrutiny when a speaker or group is denied access to a traditional or non-traditional public forum.[123] Public college regulations of speech through speech codes have been plagued by vagueness and overbreadth problems in the state and federal court systems.[124] However, nearly all public college campuses still retain speech codes that may have a chilling effect on many forms of protected speech.[125] Furthermore, the rise of PC Culture on college campuses has contributed to the chilling of protected speech.[126] However, the Supreme Court has laid the groundwork, through the heckler's veto line of cases, that government may have an affirmative duty to protect deliberation in public forums, such as college campuses.[127]

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[118] *Id.* at 261–62.

[119] *Id.* at 252.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 255 ("On this record, there can be no reasonable dispute that the WCSO effectuated a heckler's veto, thereby violating the Bible Believers' First Amendment rights.").

[123] *See supra* Subpart II.A.

[124] *See supra* Subpart II.B.

[125] *See supra* Subpart II.B.

[126] *See supra* Subpart II.C.

[127] *See supra* Subpart II.D.

III. FREE EXPRESSION AND DELIBERATIVE DEMOCRACY

Deliberative democracy is "a form of government in which free and equal citizens . . . justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future."[128] The theory of deliberative democracy is to provide a blueprint for how the ideal American democracy would work, and does work, when all branches of government and the people participate in reasoned deliberation.[129] Deliberative democracy relies on "the idea that when free and equal people come together and discuss important decisions jointly—justifying their reasons publicly on the basis of generally understood principles—then the resulting policy will be both better for society and better for the participants themselves."[130] Thus, deliberative democracy is focused on two main goals: (1) to encourage people to deliberate and justify their positions and (2) to produce policy that is the best possible outcome for the most people.[131] To accomplish those goals, deliberative democracy requires that deliberators (1) provide reasons for their positions and (2) that the reasons be accessible to opposing deliberators.[132] Furthermore, as a theory, deliberative democracy recognizes that in a heterogeneous democracy, such as the United States, diversity of opinion may cause instability.[133]

Part III will discuss the requirements for a successful, fully-functioning deliberative democratic system and the threats that a deliberative democratic system may face.[134] Subpart A will discuss the deliberative democratic requirements of

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[128] AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 7 (2004).

[129] Maya Sen, *Court Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 305 (2013).

[130] *Id.*

[131] *Id.*

[132] GUTMANN & THOMPSON, *supra* note 128, at 3–5 (discussing the three main requirements of deliberative democracy).

[133] William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1294 (2005) ("Our country is more ethnically, religiously, and ideologically heterogeneous now than at any previous time in its history—and that diversity is a source of potential instability.").

[134] *See infra* Part III.

reason-giving and accessibility.[135] Last, Subpart B will discuss the effects that a lack of deliberation may have on a democratic society, such as enclave deliberation and political polarization.[136]

A. The Requirements of Deliberative Democracy

Deliberative democracy has two main requirements: deliberators must provide reasons for their positions, and those reasons must be accessible to the opposing deliberators.[137] The purpose of the reason-giving requirement is to encourage deliberators to discover not only their policy differences, but their policy similarities as well.[138] The accessibility requirement ensures that reasons are given in public and that reasons are based on generally understood principles.[139] When reasons are based on generally understood principles, those reasons are both morally acceptable and respectful of the opposing side.[140] Thus, the requirements of deliberative democracy facilitate productive and reasoned deliberation in a democracy by focusing on the similar morals that can be discovered by opposing parties during deliberation.

1. Reason-giving

In a deliberative democracy, if there is deliberation of a contentious issue among the politically relevant groups, then each side may address opposing arguments in a respectful manner and justify its own position to the opposing party.[141] This theory incorporates "an ideal of reciprocity, in which citizens are aware of and responsive to one another's interests and claims."[142] The idea of reciprocity is grounded in the idea that "[d]eliberation cannot make incompatible views compatible, but it can help participants recognize the moral merit in their opponents."[143] By providing reasons for their

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[135] *See infra* Subpart III.A.

[136] *See infra* Subpart III.B.

[137] *See infra* Subpart III.A.

[138] *See supra* Subpart III.A.1.

[139] *See supra* Subpart III.A.2.

[140] *Id.*

[141] Sen, *supra* note 129, at 306.

[142] Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 37 (1995).

[143] GUTMANN & THOMPSON, *supra* note 128, at 11.

political positions, deliberators are welcoming moral disagreement from opposing deliberators.[144] However, the practice of reason-giving facilitates mutual respect among deliberators that morally disagree by exposing the similarities and differences on certain issues.[145] Thus, when deliberators give reasons for their positions, participants in deliberation can learn from their opposition and use their political similarities to "develop new views and policies that can more successfully withstand critical scrutiny."[146] As a result, reason-giving is the first step of deliberation in which deliberators are able to discover "their individual and collective misapprehensions" of the political opposition.[147] Once deliberators have recognized their similarities by noting their misapprehensions about their political opposition, each side can begin to further develop policies and ideas that are more accessible to their opposition.

2. Accessibility

The accessibility requirement of deliberative democracy is made up of two internal requirements: reason-giving must be done in public and the reasons that are given must be based on generally understood principles.[148] Thus, the accessibility requirement means that reasons must be accessible in the sense that they must be able to be perceived by deliberators. Furthermore, the accessibility requirement means that reasons must be accessible in the sense that opposing deliberators can understand the underlying premise and support for the reason. Deliberation behind closed doors and among private parties is not enough. Deliberation must take place in public and "not merely in the privacy of one's mind."[149] When deliberation is done in public, deliberators can "expand their knowledge, including both their self-understanding and their collective

[144] *Id.*

[145] *Id.*

[146] *Id.* at 12 ("Through the give-and-take of argument, participants can learn from each other, come to recognize their individual and collective misapprehensions, and develop new views and policies that can more successfully withstand critical scrutiny.").

[147] *Id.*

[148] Sen, *supra* note 129, at 305 (arguing that deliberative democracy depends on deliberators "justifying their reasons publicly on the basis of generally understood principles").

[149] GUTMANN & THOMPSON, *supra* note 128, at 4.

understanding of what will best serve their fellow citizens."[150] Thus, deliberation must occur in public in order to enable deliberators to be responsive to the concerns and morals of the opposing deliberators.

The requirement that deliberators give reasons based on generally understood principles is also known as the theory of reciprocity.[151] The theory of reciprocity, which requires that each side justify their positions in a manner that could be understood by the opposing party, requires that parties not base their positions on theories or ideas that are not reasonably acceptable to the opposing side.[152] For example, appeals to religion as a support for public policy are inaccessible to others that do not share the same religious beliefs.[153] Furthermore, positions which would violate the religious beliefs of the opposing party would also violate the principle of reciprocity.[154] Overall, the purpose of deliberative democracy is to reach a democratic decision which may be disagreeable to certain groups, but is still accessible to them if the disagreeing side can understand the essential content of the decision.[155] The theory of reciprocity is not intended to reconcile views that are irreconcilable, but it is intended to clarify specifically how two opposing parties can come to an agreement.[156] By justifying their positions in terms that are accessible to those with opposing viewpoints, deliberators will be able to "distinguish those disagreements that arise from genuinely incompatible values from those that can be more resolvable than they first appear."[157] However, genuinely incompatible values may arise in deliberation, thus resulting in a lack of agreement on a particular reason's morality.

The morality requirement is a prerequisite to providing reasons based on generally understood principles. In order to give a reason in terms that are generally understood, the

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[150] *Id.* at 12.

[151] *Id.* at 4.

[152] *Id.*

[153] *Id.*

[154] *See Id.*

[155] GUTMANN & THOMPSON, *supra* note 128, at 4.

[156] *Id.* at 11 ("Deliberation cannot make incompatible values compatible, but it can help participants recognize the moral merit in their opponents' claims when those claims have merit.").

[157] *Id.*

reason must be morally acceptable to the opposing party.[158] In order to be morally acceptable to an opposing party, the "argument for the position must presuppose a disinterested perspective that could be adopted by any member of a society, whatever his or her other particular circumstances (such as class, race, or sex)."[159] However, because reasonable people may disagree on the morality of a particular view, there will often be certain reasons and positions that are based on unacceptable morals to the opposing side.[160] Despite the likelihood that opposing sides will settle upon moral reasons that are unacceptable to one another, deliberative democracy requires that deliberation on other issues continue among opposing groups as a result of the mutual respect requirement.

Deliberative democracy requires that deliberating groups practice mutual respect for opposing deliberators and their viewpoints.[161] Since deliberators will likely have many different positions on many different issues, the mutual respect requirement ensures that deliberators vehemently opposed on one issue can compromise on other less divisive issues.[162] However, the mutual respect requirement is more than just tolerance; "[i]t requires a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees."[163] Thus, the mutual respect requirement demands that deliberators "affirm the moral status of their own position and acknowledge the moral status of their opponents' position."[164] However, the mutual respect requirement may be abused if deliberators acknowledge an opposing deliberator's moral view as immoral for purposes of deliberation.[165] Thus, when a moral view is treated as immoral for the purposes of reason-giving in deliberative democracy, the deliberator that refuses to recognize the moral view as moral is stalling the

[158] *Id.* at 72 (noting that deliberative democracy has a controversial morality requirement).

[159] *Id.*

[160] *Id.*

[161] *Id.* at 79 (discussing the mutual respect requirement "that permits democracy to flourish in the face of (at least temporarily) irresolvable moral conflict").

[162] *See id.*

[163] *Id.*

[164] *Id.* at 81.

[165] *Id.* at 83 ("First, acknowledging the moral status of a position that one opposes requires, at a minimum, that one treat it as a moral rather than a purely political, economic, or other kind of nonmoral view.").

deliberative process.[166] As a result, if deliberators abuse the mutual respect requirement of deliberative democracy, the entire process can come to a screeching halt.

B. The Effects of a Lack of Deliberation in a Democracy

Instability due to a diverse society is inevitable, but deliberative democracy seeks to defuse the tension by requiring reasoned deliberation among "all politically relevant groups."[167] Deliberative democracy relies on the participation of all politically relevant groups because when one or more groups exit the deliberative process, democratic progress may come to a halt.[168] A democratic process coming to a halt is evidenced by the numerous numbers of countries that overthrew the political establishment during the "Arab Spring,"[169] as well as in the birth of our own country through the Revolutionary War against Great Britain.[170] However, deliberative democracy can neutralize political upheaval if politically relevant groups continue deliberation on a contentious issue.[171]

In his book *Designing Democracy*, Professor Cass Sunstein discussed the disastrous effects that result from a lack of deliberation in a democracy.[172] Professor Sunstein argues that when there is a lack of deliberation in a democracy, social groups will be driven further apart resulting in extreme polarization.[173] "Enclave deliberation," Sunstein says, is "deliberation within small groups of like-minded people" which may lead to polarization of that particular social group or

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[166] *Id.* (arguing that the first requirement of mutual respect is that the opposing party recognize the moral position of the opposing parties if they are actually moral positions).

[167] Eskridge, *supra* note 133, at 1294.

[168] *Id.* ("Pluralist democracy is dynamic and fragile. It is dynamic because the nature, composition, and balance of politically relevant groups shift over time. It is fragile because it depends on the commitment of all politically relevant groups to its processes. Political losers may exit the system unless they think their interests will be accommodated or their losses from exiting will exceed their gains.").

[169] John Simpson, *Who are the Winners and Losers from the Arab Spring?*, BBC (Mar. 11, 2016), http://www.bbc.com/news/world-middle-east-30003865.

[170] Eskridge, *supra* note 133, at 1294.

[171] *Id.* at 1295 ("Pluralist democracy potentially engages most citizens in the affairs of governance, and that engagement encourages cooperation across the board.").

[172] *See* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 15–49 (2001).

[173] *Id.* at 15 ("When like-minded people meet regularly, without sustained exposure to competing views, extreme movements are all the more likely.").

"enclave."[174] Enclave deliberation closely parallels the ideas behind establishing safe spaces on college campuses or college speech codes enacted to protect minority viewpoints.[175] The idea of enclave deliberation presents a possible fatal flaw to the theory of deliberative democracy because enclave deliberation only occurs when a particular social group has either not been granted access to deliberation or has not succeeded in the deliberative process.[176] However, the fact that enclave deliberation may exist despite deliberative democracy does not mean that the theory of deliberative democracy is not a good theory.

In fact, enclave deliberation may be proof that when deliberation fails, social groups may exit the political process, thus bolstering the theory of deliberative democracy.[177] As stated above, deliberative democracy depends on all politically relevant groups participating in the deliberative process.[178] When a political minority feels as though its interests have not been addressed or that it has not been given adequate recognition in the deliberative process, the group may exit the political process and cease deliberation.[179] In fact, the problem of groups exiting the deliberative process is not "mere theory" because "democracies fail all the time, including those

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[174] *Id.*

[175] *See supra* Part II (discussing the state of free expression on college campuses and the establishment of college speech codes as an attempt to protect minority viewpoints); *see also* SUNSTEIN, *supra* note 172, at 16 ("Hence enclave deliberation might be the only way to ensure that those views are developed and eventually heard. Without a place for enclave deliberation, citizens in the broader public sphere may move in certain directions, even extreme directions, precisely because opposing voices are not heard at all.").

[176] SUNSTEIN, *supra* note 172, at 16 ("Group polarization is naturally taken as a reason for skepticism about enclave deliberation and for seeking to ensure deliberation among a wide group of diverse people. But there is a point more supportive of enclave deliberation: Participants in heterogeneous groups tend to give least weight to the views of low-status members—in some times and places, women, African Americans, less educated people.").

[177] *Id.* at 15 ("As I will show, group polarization helps explain an old point, with clear foundations in constitutional law in many nations, to the effect that social homogeneity can be quite damaging to good deliberation.").

[178] Eskridge, *supra* note 133, at 1294 ("Pluralist democracy is dynamic and fragile. It is dynamic because the nature, composition, and balance of politically relevant groups shift over time. It is fragile because it depends on the commitment of all politically relevant groups to its processes. Political losers may exit the system unless they think their interests will be accommodated or their losses from exiting will exceed their gains.").

[179] *Id.*

generating prosperity for their citizens."[180] Thus, a political group may exit the deliberative process when the political group believes it will be accommodated in exchange for reentering or the group has something further to gain from exiting.[181]

Deliberative democracy relies on the idea that when free and equal people seek to make political decisions, those people must come together and justify their decisions, in public, and in terms that are generally understood to all.[182] The reason-giving requirement and the accessibility requirement of deliberative democracy ensure that deliberators are aware of the opposing party's view, are responsive to the opposing party's view, and are respectful of the opposing party's view.[183] When an opposing party has a viewpoint that is accessible to the opposing side, that viewpoint is both based on generally understood principles and morally acceptable.[184] If a position is based on generally understood principles, then opposing parties will thoroughly understand the disagreements that exist and the areas where agreements can be made.[185] Furthermore, if a view is morally acceptable to an opposing party, then the opposing views of deliberators can be reconciled on an outcome beneficial to all.[186] However, if there is a complete lack of deliberation, then deliberative democracy will come to a halt and any political decisions made will not be the result of reasoned deliberation, but of purely partisan politics.[187] Furthermore, the practical effects of a lack of deliberation are that political groups may exit the political process and those groups will grow further polarized.[188]

IV. AVOIDING DELIBERATION

The avoidance of deliberation on college campuses can be directly attributed to the rise of college speech codes and PC

[180] *Id.*
[181] *Id.*
[182] *See supra* Part III.
[183] *See supra* Subpart III.A.
[184] *See supra* Subpart III.A.1.
[185] *See supra* Subpart III.A.2.
[186] *See supra* Subpart III.A.2.
[187] *See supra* Subpart III.B.
[188] *See supra* Subpart III.B.

culture.[189] Since their widespread enactment on campuses across the country, college speech codes have chilled speech that college administrators have deemed to be immoral due to their implicit racial or sexual bias. [190] A rise in PC culture among college students further bolstered college speech codes.[191] Due to a combination of speech codes and PC culture, college students abuse two of deliberative democracy's most important requirements: the morality requirement and the mutual respect requirement.[192] Due to such abuses, minority political viewpoints may meet with strong backlash from students who share opposing viewpoints.[193] In order to protect minority viewpoints and ensure deliberation, the Supreme Court should consider expanding the heckler's veto doctrine to situations in which a heckling majority may unconstitutionally stifle a minority viewpoint on a college campus.[194] By doing so, the Court would bolster its claim in the heckler's veto cases that public deliberation on political issues is the foundation of American democracy.[195]

A. PC Culture and Speech Codes as a Hindrance to Deliberative Democracy

The combination of college speech codes and student-imposed PC culture results in a lack of reasoned deliberation on American college campuses.[196] While campuses enacted speech codes to combat a rise in deplorable conduct, they have also been complicit in chilling speech.[197] Furthermore, the self-imposition by college students of PC culture on campuses may result in college students being punished for what they think

[189] *See infra* Subpart IV.A.

[190] *See infra* Subpart IV.A.

[191] *See infra* Subpart IV.A.

[192] *See infra* Subpart IV.A.

[193] *See infra* Subpart IV.A.

[194] *See infra* Subpart IV.B.

[195] *See infra* Subpart IV.B.

[196] Kenneth Lasson, *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 TENN. L. REV. 689, 692 (1996) (noting that when it comes to PC culture, "[s]omewhere along the way, however, the line between consciousness-raising and common sense was grievously breached"); Moore, *supra* note 15, at 514 (noting that college speech codes were enacted to combat a rise in racist, sexist, and homophobic speech, but has actually stigmatized opposing viewpoints).

[197] Moore, *supra* note 15, at 514–18 (showing that college speech codes were enacted to protect college students from racist, sexist, and homophobic speech, but were actually enacted as a response to media pressure).

and say, regardless of whether the speech is meant to be racist, sexist, or homophobic.[198] Thus, through the imposition of speech codes and the fostering of PC culture, public colleges are complicit in the abuse of the morality requirement and the mutual respect requirement of deliberative democracy, which leads to a lack of deliberation on college campuses.

Deliberative democracy requires that reasons given during deliberation be accessible to the opposing side.[199] To be accessible, reasons must be morally acceptable to the opposing side.[200] However, the practical effect of this requirement is that if an opposing side deems a position or reason morally deplorable, that opposing side may justify itself in not participating in deliberation based on this subjective standard of immorality.[201]

Both students and college administrations have abused the morality requirement of deliberative democracy to avoid deliberation on contentious societal issues. For example, college speech codes, such as the one challenged in *Doe v. University of Michigan*, declared that any speech that "stigmatizes or victimizes . . . on the basis of race, ethnicity, religion, [or] sex" was immoral and could not be used by students on campus.[202] By imposing this particular regulation of speech, the University of Michigan declared a vast amount of speech as immoral and, thus, barred it from deliberation on campus.[203] In effect, the policy classified an entire class of speech as being immoral.[204]

In fact, the plaintiff in *Doe v. University of Michigan* was a biology student who felt that certain theories that relied on the biological differences between men and women could be "perceived as 'sexist' and 'racist' by some students, and he feared that discussion of such theories might be sanctionable"

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[198] *Id.* at 517 (noting that PC culture on college campuses may be chilling the speech of those that are not racist, sexist, or homophobic).

[199] Sen, *supra* note 129, at 305 (arguing that deliberative democracy depends on deliberators "justifying their reasons publicly on the basis of generally understood principles").

[200] GUTMANN & THOMPSON, *supra* note 128, at 72 (discussing the morality requirement implicit in the accessibility requirement of deliberative democracy).

[201] *Id.* (noting that because of the differing morals of deliberators, certain positions will be unacceptable to opposing deliberators).

[202] 721 F. Supp. 852, 856 (E.D. Mich. 1989).

[203] *See id.*

[204] *See id.*

under the speech code.[205] Despite the University of Michigan's claims that the speech code only implicated immoral speech, this case illustrates that the speech code likely chilled speech that was not immoral and could have been discussed openly on campus.[206] The University of Michigan classified a broad range of arguably moral speech as immoral in order to remove it from democratic deliberation on campus, thus abusing the morality requirement of deliberative democracy.

Similarly, PC culture has also sought to classify parts of speech as immoral.[207] PC culture gained popularity because it sought to reduce the use of words deemed immoral due to implicit racism and sexism, two reasonably immoral positions.[208] However, PC culture, which was revered as a positive reaction to implicit racism and sexism, has now been reduced to an outright rejection of common sense due to its sweeping disqualification of many viewpoints.[209] For example, students at Emory University claimed they no longer felt safe after chalk drawings in support of Donald Trump for President appeared on campus.[210] Emory students protested the appearance of the chalk drawings by chanting, "You are not listening! Come speak to us, we are in pain!" throughout the university quad.[211] The chants and comments of the Emory University students could have resulted in a request for deliberation on the issue of whether Trump was a good candidate for President.[212] However, those same students claimed that the pro-Trump chalking promoted "hate and discrimination."[213] Thus, the students protesting at Emory

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[205] *Id.* at 858.

[206] *Id.*

[207] Anderson, *supra* note 18, at 174 (citing John Leo, *PC Follies: The Year in Review*, U.S. NEWS & WORLD REPORT (Jan. 27, 1992)) (noting that PC Culture "posits that because the mere discussion of certain ideas or viewpoints offend certain groups, the expression of these ideas or viewpoints should not be allowed").

[208] Lasson, *supra* note 196, at 692.

[209] *Id.* (noting that when it comes to PC culture, "[s]omewhere along the way, however, the line between consciousness-raising and common sense was grievously breached.").

[210] Susan Svrluga, *Someone Wrote 'Trump 2016' on Emory's Campus in Chalk. Some Students Said They No Longer Feel Safe*, WASH. POST (Mar. 24, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/someone-wrote-trump-2016-on-emorys-campus-in-chalk-some-students-said-they-no-longer-feel-safe/.

[211] *Id.*

[212] *Id.*

[213] *Id.* (quoting a post on the Emory Latino Student Organization Facebook page).

University have deemed those supporting Trump for President in 2016 as taking an immoral position that cannot satisfy deliberative democracy.

PC culture has had the effect of a Speech Code, but without the government action that renders speech codes unconstitutional, like the one in *Doe v. University of Michigan*.[214] By shifting censorship to a social and cultural movement (PC culture) and supplementing it with gutted college speech codes, students and colleges combat what they believe to be racist and sexist speech. Speech codes and PC culture operate in such a way that reasonably moral or questionably moral positions have been deemed to be absolutely immoral for the purpose of deliberative democracy. As a result, opposing deliberators have assumed that certain positions are immoral *before* deliberation on campus can begin; deliberation on issues such as the presidential election or sexism are not being fully discussed on campus because some deliberators cry "Immoral!" prior to deliberation. The abuse of the morality requirement by PC culture and college speech codes evidences a lack of mutual respect for opposing viewpoints.

Deliberative democracy requires that deliberators practice mutual respect to ensure that opposing deliberators can compromise on other less contentious issues.[215] However, as illustrated by PC culture and college speech codes, certain positions and the people who take those positions are considered unrespectable based on their choice of political positions.[216] By dismissing opposing deliberators as unworthy of respect, students on college campuses have misunderstood the point of political debate and reasoned deliberation. First, many college students fail to recognize that while an opposing deliberator may take one position that is deplorable to them, the two sides may share many other positions or views.[217] Second, many college students misunderstand that deliberative

[214] 721 F. Supp. 852, 867 (E.D. Mich. 1989) (holding that the University of Michigan's speech code was unconstitutionally vague).

[215] *See* GUTMANN & THOMPSON, *supra* note 128, at 79.

[216] Svrluga, *supra* note 210 (showing how Emory University students have claimed that taking the position that Donald Trump should be President does not deserve respect because supporting Trump is racist and hateful).

[217] *See* GUTMANN & THOMPSON, *supra* note 128, at 80 (noting that the purpose of mutual respect in reasoned deliberation is to ensure cooperation on other less contentious issues).

democracy does not require tolerance of immoral viewpoints; "[i]t requires a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees."[218] Therefore, when college students on campuses such as Emory University prematurely declare an entire political group as immoral based on one or two policy positions, those students abuse the moral and mutual respect requirements of deliberative democracy.

The combination of PC culture and college speech codes chill minority political points of view on college campuses. This chilling effect is evidenced by the various constitutional challenges to speech codes, as well as by examples like the student outrage for opposing political speech on the campus of Emory University. It is likely that many college campuses that employ speech codes and foster PC culture cannot comport with deliberative democracy due to abuse of the morality and mutual respect requirements.

B. Using the Heckler's Veto Cases to Protect Deliberation on College Campuses

The heckler's veto cases and their commitment to deliberative democracy present the perfect line of cases for dealing with the problems that speech codes and PC culture present for college campuses. If the government forces a public speaker to cease speaking based on the violent reaction from the speaker's crowd, then the government has effectuated a heckler's veto.[219] The practical implication of the heckler's veto is that any group of people opposed to the viewpoints of the speaker may cause enough of a ruckus to convince the police that public safety is at risk, thus causing the police to end the speech.[220] In most of the cases in which the Supreme Court has been faced with a heckler's veto case, the Court has ruled in favor of the speaker that claimed his First Amendment right was infringed.[221] However, in *Feiner v. New York*, the Court

[218] *Id.*

[219] Leanza, *supra* note 78, at 1308 (describing the factual situation in which heckler's veto cases may arise).

[220] *Id.*

[221] Terminiello v. City of Chicago, 337 U.S. 1, 5 (1949) (holding that a conviction for disturbing the peace based solely on the fact that the speaker's speech "stirred people to anger, invited public dispute, or brought about a condition of unrest" could not stand); Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) (holding that speech cannot be financially burdened "simply because it might offend a hostile

refused to reverse a defendant's conviction because it equated his speech with inciting a riot.[222] Despite the Court's apparent inconsistency in combatting heckler's vetoes, in each decision either the majority opinion or the dissenting opinion has opined about the importance of deliberation and free expression in our democracy.[223]

While the Court often adheres to the idea of deliberative democracy, it has also hinted that protection for minority speakers may extend a bit further than having their convictions overturned for not comporting with the First Amendment. For example, in *Terminiello v. City of Chicago*, the Court hinted that the government may have an affirmative duty to protect a speaker whose speech is safeguarded under the First Amendment from a hostile crowd.[224] The *Terminiello* Court mentioned that protected speech may "induce[] a condition of unrest," but the speaker, because his speech is protected, cannot be silenced because of the unrest that results from disagreement in the crowd.[225] The *Terminiello* Court implied that police must protect speakers espousing protected speech from a crowd that grows violent in reaction to the speech.[226] In *Feiner*, Justice Black argued outright that the police had an affirmative duty to protect a speaker from an unruly crowd if the speaker's speech was protected by the First Amendment.[227] Justice Black recognized that the police, in this

mob"). *But see* Feiner v. New York, 340 U.S. 315, 320–21 (1951) (holding that the speaker's speech crossed the line into unprotected speech when it stirred a crowd to violence and forced the police to arrest the speaker to quell the violence).

[222] *Feiner*, 340 U.S. at 321 ("It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.").

[223] *See, i.e.*, *Terminiello*, 337 U.S. at 4 (arguing that "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected."); *Feiner*, 340 U.S. at 329 (Black, J., dissenting) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) ("[I]n spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.").

[224] *Terminiello*, 337 U.S. at 4 ("Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

[225] *Id.*

[226] *Id.* (implying that a speaker should be protected from an unruly crowd as long as the speaker's speech does not present a clear and present danger under *Chaplinsky*).

[227] *Feiner*, 340 U.S. at 326 (Black, J., dissenting) ("Moreover, assuming that the 'facts' did indicate a critical situation, I reject the implication of the Court's opinion

case, had a duty "to protect the petitioner's right to talk, even to the extent of arresting the man who threatened to interfere."[228]

The Court took a similar position in *Forsyth County v. Nationalist Movement* when it held that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[229] The Court decided *Forsyth County* in the context of whether a state county may charge fees for police protection at a parade or rally that was likely to require heightened security due to hostile crowds.[230] Thus, the Court was implying that the government and police have an affirmative duty, regardless of the cost, to protect speakers from violent crowds.[231]

The Sixth Circuit has also interpreted heckler's veto cases as imposing an affirmative duty on the government to protect the minority viewpoint from a hostile crowd.[232] The Sixth Circuit, in *Bible Believers v. Wayne County, Michigan*, noted that the police refused to quell the violent hecklers, but instead targeted the minority Bible Believers as being the cause of the violence in the crowd.[233] The court in *Bible Believers* said that "[w]hen a peaceful speaker . . . is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals."[234] Thus, according to the Sixth Circuit, police must arrest and quell violent hecklers in order to protect constitutionally protected speakers from violence due to their speech.[235]

The Supreme Court's and the Sixth Circuit's focus on free

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that the police had no obligation to protect petitioner's constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him.").

[228] *Id.* at 327.

[229] Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992).

[230] *Id.* at 126 (noting that the county ordinance was passed in order to require demonstrations and parades to pay to have a police presence as a response to violent crowd reactions).

[231] *Id.* at 134–35 ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.").

[232] Bible Believers v. Wayne Cty., 805 F.3d 228, 255 (6th Cir. 2015) ("On this record, there can be no reasonable dispute that the WCSO effectuated a heckler's veto, thereby violating the Bible Believers' First Amendment rights.").

[233] *Id.* at 241.

[234] *Id.* at 252.

[235] *Id.* at 252–53.

expression in a democracy, coupled with the implication that the government has an affirmative duty to protect constitutionally-protected speakers, illustrates that the government has an affirmative duty to promote deliberative democracy. Thus, when a public college effectuates a heckler's veto, the college has violated the tenets of both deliberative democracy and the First Amendment of the Constitution.

However, there are numerous ways that a public college can avoid violating the Constitution by fostering an educational environment that enables deliberative democracy. For example, when a political group seeks to hold a demonstration in a traditional public forum on a college campus,[236] the college administration should reserve an adjacent tract of land for groups with opposing viewpoints. By providing an area for opposing viewpoints in a traditional public forum, the deliberative democratic requirement that reasons be given in public is satisfied.[237] Furthermore, by affirmatively granting opposing viewpoints access to an adjacent space, the public college would foster the reason-giving requirement of deliberative democracy.[238] By granting groups with opposing viewpoints access to the same crowd, the two groups could make their similarities and differences better known to passersby and to each other.[239] Most importantly, by granting access to an adjacent tract of land to opposing groups, public colleges could combat the abuse of the morality and mutual respect requirements of deliberative democracy by many student groups.[240] If public colleges thus fostered deliberation, student groups abusing the morality requirement by declaring opposing viewpoints immoral and not worthy of deliberation would be forced to deliberate and defend the merits of their

[236] Page & Hunnicutt, *supra* note 12, at 11 (noting that traditional public fora on college campuses have been identified as "streets, sidewalks, open mall areas, and other generally public areas on campus").

[237] Sen, *supra* note 129, at 305 (stating that deliberative democracy requires that reasons be given in public).

[238] *Id.* at 306.

[239] GUTMANN & THOMPSON, *supra* note 128, at 12 ("Through the give-and-take of argument, participants can learn from each other, come to recognize their individual and collective misapprehensions, and develop new views and policies that can more successfully withstand critical scrutiny.").

[240] *See supra* Subpart III.A.2. (discussing the morality requirement, which many college students have abused by declaring many opposing viewpoints as immoral in order to avoid deliberation on the merits).

positions.[241] Similarly, by fostering public deliberation, public colleges would ensure that student groups that abuse the mutual respect requirement by painting their ideological opponents as bigots would be forced to face their opponents and debate them on the merits.[242] Thus, this hypothetical public college would satisfy deliberative democracy and would pass constitutional muster if challenged.

This hypothetical public college's regulation described above would pass constitutional muster because the regulation allowing opposing viewpoints access to the same crowd would be a content-neutral regulation of speech.[243] First, the public college would be furthering the important governmental interest of fostering deliberation in a democratic society.[244] Second, the government's interest would not be related to the suppression of the speech as long as the government has not actively searched for opposing protestors to place on the adjacent tract of land.[245] Third, the only incidental infringement of the First Amendment that may arise would occur if the protestors (provided with an adjacent area to protest) grew violent and the government effectuated heckler's veto against the protest that was initially planned.[246] However, if the heckler's veto cases impose an affirmative duty on government to protect an unpopular speaker or group from a violent crowd, the campus police must do everything they can to quell the violence, thus avoiding the First Amendment issue.[247]

Public colleges may run afoul of the Constitution in a case where a political speaker speaks in a non-traditional public

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[241] *Id.*

[242] *Id.*

[243] United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that content-neutral regulations of speech are permissible when they further an important governmental interest, the government's interest is not related to suppression of the speech, and the restriction on free speech is no greater than is essential to accomplish the interest).

[244] *Id.* at 377; *see also* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (arguing that "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected."); Feiner v. New York, 340 U.S. 315, 329 (1951) (Black, J., dissenting) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)) (arguing that "in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy").

[245] *O'Brien*, 391 U.S. at 377.

[246] *Id.*

[247] *See supra* notes 221–40 and accompanying text.

forum as defined in *Cornelius v. NAACP Legal Defense and Education Fund*.[248] The *Cornelius* Court defined such a forum as "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[249] Thus, when a public college allows a political speaker to speak in a campus auditorium, the public college has granted access to a non-traditional public forum.[250] However, situations may arise where protestors interrupt the constitutionally protected speaker in such a way that the speaker may be asked to stop speaking. By asking the speaker to stop speaking, rather than removing hecklers from the auditorium, a public college would be effectuating a heckler's veto. In order to facilitate deliberation and avoid the heckler's veto problem, a public college should require that a speaker accept questions after his speech or allow for an opposing group to have a demonstration outside of the auditorium. However, a public college may not pick and choose who may enter the auditorium based on their opposition to the speaker's ideology or speech.[251]

If a public college restricted protestors' access to a speech given in an auditorium, the public college would be unconstitutionally discriminating based on viewpoint.[252] Thus, the public college must allow people to attend the speech, regardless of their group affiliation or whether they oppose the speaker. However, once the protestor has begun to disrupt the speaker in a way that hinders the speech or disrupts discussion, the public college may remove the protestor due to nonconformance with the reasonable "time, place, and manner" restriction that a speaker in a non-traditional public forum be allowed to speak undisturbed.[253] Furthermore, removal of an unruly protestor would be justified by the fact that the public college allowed for a question-and-answer forum, as well as opposing protests outside the forum. Thus, the public college that fostered deliberation through question-and-answer session

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[248] 473 U.S. 788, 802 (1985) (defining non-traditional public forum).

[249] *Id.*

[250] *Id.*

[251] *Id.* at 800.

[252] *Id.* (holding that public colleges may not exclude expression merely because the public college opposes the speaker's view).

[253] Healy v. James, 408 U.S. 169, 192–93 (1972) ("Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected.").

and protests outside of the auditorium could not be accused of infringing First Amendment rights.

V. CONCLUSION

Due to the rise of college speech codes and PC culture, college campuses have failed to foster the reasoned deliberation that would benefit a democracy. A combination of speech codes and PC culture has chilled speech related to minority political viewpoints and resulted in a lack of reasoned deliberation on college campuses across the country. Various student groups and political organizations have abused the ideals of deliberative democracy. They have done so by claiming that all viewpoints of entire political groups are immoral based on only one or two viewpoints being reasonably immoral. Furthermore, the same student groups and political organizations have failed to practice mutual respect for their opposing deliberators by painting all opposing deliberators as bigoted or sexist and, thus, avoiding deliberation. To counter these abuses, public colleges should foster deliberation by providing counter-protest areas for opposing viewpoints to be heard. Furthermore, public colleges should foster deliberation when speakers give speeches in auditoriums by requiring a question-and-answer session or requiring that an area outside of the auditorium be reserved for a protest to counter the speaker.

*Nicholas A. Schroeder**

* Articles Editor, Michigan State Law Review; J.D.2017, Michigan State University College of Law; B.A. in English, Florida State University; B.S. in Political Science, Florida State University. The author would like to thank Glen Staszewski for introducing the author to Deliberative Democracy. The author would also like to thank the Michigan State Law Review 2016–2017 Editorial Board for their many debates on politics and the First Amendment as those debates served as the inspiration for this article.